BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

ROCHELLE WASTE DISPOSAL, L.L.C.,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB No. 07-113
	)	
THE CITY OF ROCHELLE, an ILLINOIS MUNICIPAL CORPORATION and THE ROCHELLE CITY COUNCIL,	)	
	)	
Respondents.	)	

NOTICE OF PROVISIONAL FILING OF MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

TO: All Counsel of Record (see attached Service List)

PLEASE TAKE NOTICE that on November 30, 2007, the undersigned provisionally filed electronically with the Illinois Pollution Control Board, 100 West Randolph Street, Chicago, Illinois 60601, the Petitioner's Motion for Summary Judgment and Memorandum in Support of Motion for Partial Summary Judgment, (all in accord with Petitioner's previously filed Motion for Leave to File Partial Motion for Summary Judgment), copies of which are attached hereto.

Dated: November 30, 2007

Respectfully submitted,

ROCHELLE WASTE DISPOSAL, L.L.C.

/s/Charles F. Helsten
Charles F. Helsten
One of Its Attorneys

Charles F. Helsten
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100 Park Avenue
P.O. Box 1389
Rockford, IL 61105-1389
815-490-4900

AFFIDAVIT OF SERVICE

The undersigned, pursuant to the provisions of Section 1-109 of the Illinois Code of Civil Procedure, hereby under penalty of perjury under the laws of the United States of America, certifies that on November 30, 2007, she served a copy of the foregoing upon:

Hon. John McCarthy 45 East Side Square, Suite 301 Canton, IL 61520 jjmccarthy@winco.net	Donald J. Moran Pedersen & Houpt 161 N. Clark St., Suite 3100 Chicago, IL 60601-3142 dmoran@pedersenhoupt.com
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Bradley Halloran Illinois Pollution Control Board 100 West Randolph Street Suite 11-500 Chicago, IL 60601 hallorab@ipcb.state.il.us	Mr. Bruce W. McKinney Rochelle City Clerk Rochelle City Hall 420 North 6th Street Rochelle, IL 61068 bmckinney@rochelle.net

Via electronic mail before the hour of 5:00 p.m., at the addresses listed above and by depositing a copy thereof, enclosed in an envelope in the United States Mail at Rockford,, Illinois, proper postage prepaid, before the hour of 5:00 P.M., addressed as above.

/s/ Danita Heaney

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MOTION FOR PARTIAL SUMMARY JUDGMENT

NOW COMES the Petitioner, Rochelle Waste Disposal, L.L.C. ("RWD"), by and through its attorneys, and moves this Honorable Board, pursuant to 35 Ill. Adm. Code 101.516 for partial summary judgment in its favor. In support of its Motion for Partial Summary Judgment, Petitioner states as follows:

1. 415 ILCS 39.2 (ii) and (vi) require that an applicant for local siting approval for a pollution control facility prove that the facility is so designed, located and proposed to be operated that public health safety and welfare will be protected and that the traffic patterns to or from the facility are so designed as to minimize the impact on existing traffic flows.

2. The City of Rochelle, as Applicant, submitted an application to the Rochelle City Council for siting approval for expansion of a landfill operated by RWD, on October 16, 2006. The City presented extensive material in its written Application for Siting Approval, as well as substantial expert testimony during hearings, establishing compliance with the aforementioned criterion.

3. No evidence was presented which either rebutted, qualified, or impeached the finding that Criterion ii and vi were complied with and fully supported by the record made in this proceeding.

4. Pursuant to Section 78-76(n) of the City of Rochelle's Siting Ordinance, the Hearing Officer appointed by the City Council issued proposed Findings of Fact and Conclusions of Law and Recommendations on April 2, 2007. The Hearing Officer found that the Applicant met the aforementioned criterion. However, the Hearing Officer imposed thirty seven (37) Special Conditions upon Applicant's siting approval.

5. As more fully set forth in its Memorandum filed contemporaneously herewith, Petitioner will establish that there is no logical relationship between the imposition of Special Conditions 13, 22, 23, 33 and 34 in their present form and furtherance of the intended goals and purposes of the Act. These Special Conditions as now set forth are not supported by the record, and are in part an improper attempt to ex post facto shift certain financial burdens onto Petitioner.

6. Special Conditions 13, 22, 23, 33 and 34 as presently structured are against the manifest weight of the evidence, are unsupported by any expert testimony and were arbitrarily imposed. As a matter of law, no genuine issue of material fact exists regarding the impropriety of these conditions in their present form. At most, these Special Conditions are only sustainable if amended in the manner discussed in the attached Brief in Support of Motion for Partial Summary Judgment to conform with the record made in this proceeding. Resultantly, summary judgment in favor of Petitioner is appropriate.

WHEREFORE, Petitioner, Rochelle Waste Disposal, L.L.C. respectfully requests that this Honorable Board, pursuant to 35 Ill. Adm. Code 101.516 grant partial summary judgment in its favor in the manner and form set forth in detail in Petitioner's Supporting Brief.

Dated: November 30, 2007

Respectfully submitted,

ROCHELLE WASTE DISPOSAL

By: s/ Charles F. Helsten
Charles F. Helsten
One of Its Attorneys

Charles F. Helsten
Richard S. Porter
Hinshaw & Culbertson LLP
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P.O. Box 1389
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MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

NOW COMES the Petitioner, Rochelle Waste Disposal, L.L.C. ("RWD"), by and through its attorneys, and moves this Honorable Board, pursuant to 35 Ill. Adm. Code 101.516 for summary judgment in that there exists herein no genuine issues of material fact, and that Petitioner is entitled to judgment as a matter of law. In support of its Motion for Partial Summary Judgment, Petitioner states as follows:

I. BACKGROUND

The Petitioner, RWD, is the current Operator of the Rochelle Municipal Landfill, located in Rochelle, Illinois. On or about September 26, 2006, the City and RWD entered into a Restatement of Host Agreement and Agreement for Operation/Development of City of Rochelle Landfill No. 2 ("Host Agreement"). The Host Agreement sets forth the terms and conditions for the operation of the facility and a proposed expansion of the existing facility. (*See generally*, Host Agreement).

The Host Agreement provides that RWD will cooperate with the City in planning and designing the expansion, and will continue as the Operator of the expansion. (*Id.*). In addition, the Host Agreement specifies that RWD will pay the City annual base fees, as well as per ton fees, and that RWD will pay additional specified sums if the siting authority grants approval for

the expansion consistent with the terms of the Host Agreement. (*Id.*). The Host Agreement further provides that RWD will donate certain real property to the City to facilitate the expansion and accommodate re-disposal of waste from Unit 1 of the existing landfill. (*Id.*). Finally, the Host Agreement provides that "[t]he City and its officers, council members and employees will not take any action which has the intended or probable effect of interfering unreasonably with the operation or expansion of the facility or the Expanded Facility." (*Id.* at ¶ 5.2.) The terms of the Host Agreement were the product of extensive investigation, study, and negotiation between the parties, and the terms memorialize the parties' respective willingness to shoulder certain specific costs, make certain specific payments, undertake certain specific duties and assume certain specific responsibilities.

On or about October 16, 2006, the City filed its Application with the Rochelle City Council seeking local siting approval for the proposed expansion. Five days of hearings on the Application ensued, commencing on January 22, 2007 and concluding on February 8, 2007. The Concerned Citizens of Ogle County ("CCOC"), an objector's group, made their objections to the expansion known for the record and hired a consultant to testify at the hearings. Thereafter, the City Council met to consider action on the Application, pursuant to Section 39.2(e) of the Illinois Pollution Control Act and pursuant to the City's local siting ordinance.

On April 2, 2007 the Hearing Officer issued Proposed Findings of Fact, Conclusions of Law and Recommendations that, "...the application meets the criteria set forth in Section 39.2 of the Act and I recommend that the City Council approve the request for local siting approval subject to the special conditions which are set forth hereinafter." (Hearing Officer's Findings of Fact, Conclusions of Law and Recommendations, at p. 5).

With respect to Criterion (i), the Hearing Officer concluded that the Applicant met the requirements, having shown that the facility is necessary to accommodate the waste needs of the

area it is intended to serve. (Hearing Officer's Findings of Fact, Conclusions of Law and Recommendations, at p. 10). The Hearing Officer similarly found that Criteria (iii), (iv), (v), (vi), (vii), (viii) and (ix) were met. (*Id.* at p. 25, 27, 34, 36, 37).

As to Criterion (ii), the Hearing Officer concluded that the Applicant's expert testimony was more credible than that provided by the consultant retained by CCOC, and he opined, "I agree with the opinions expressed by Mr. Drommerhausen and Mr. Moose. Their testimony appears to be uncontradicted and unrebutted." (*Id.* at p. 20). (Emphasis Added). He accordingly found that the requirements of Criterion (ii) were met.

With respect to Criterion (vi), the hearing officer observed that the only testimony concerning that criterion was provided by the applicant's expert, Mr. Werthmann, and after reciting the evidence presented, the Hearing Officer concluded that Criterion (vi) was met. (*Id.* at p. 34).

Although he found that all the statutory criteria were met on the face of the evidentiary showing made by the Applicant, the Hearing Officer nevertheless recommended imposing numerous Special Conditions, which he proposed in order to "encourage compliance by the operator and assist in minimizing the concerns of CCOC." (*Id.* at 38) (emphasis added).

On or about April 11, 2007, the City Council passed Resolution R07-10, in which the Council rendered its findings. The Resolution includes the finding that every siting criterion was met, and, accordingly, grants approval of the site expansion. However, the Resolution imposes thirty-seven (37) Special Conditions, some of which echo the conditions proposed by the Hearing Officer.

Thereafter, RWD filed a Motion for Reconsideration in which it objected to Conditions 8, 13, 22, 23, 26, 28, 33 and 34. On May 14, 2007, the City Council passed Resolution R07-18,

which affirmed the siting permit approval and the imposition of all of the conditions, but modified Condition 34.

The Special Conditions at issue in this Motion are not necessary to accomplish the purposes of the Act, are inconsistent with the Board's regulations, and are not supported by the evidence, testimony of experts, or any other portion of the record. The Special Conditions would significantly alter the terms negotiated by the City and RWD in the Restatement of the Host Agreement, would dramatically increase the costs of operation and would unreasonably interfere with operation of the proposed expansion and the economic feasibility of the project. Moreover, their imposition is against the manifest weight of the evidence, is arbitrary in nature, and is derived largely from the Council Members' eagerness to politically minimize concerns asserted by the CCOC. In sum, Petitioner will establish in this Motion that there is no genuine issue of material fact as to the invalidity and lack of evidentiary support for the impositions of conditions 13, 22, 23, 33 and 34, and they should be modified as a matter of law to comport with the undisputed evidence contained in the record made in this proceeding.

A. The Criteria at Issue in this Appeal

No Special Conditions were imposed in conjunction with the Council's findings concerning Criteria (iv), (v), (vii), (viii) and (ix). The conditions imposed in R07-10 are associated with: Criterion (i) (Condition 36, not at issue in this motion); Criterion (ii) (Conditions 1-32, some of which are at issue); Criterion (iii) (Condition 37, not at issue in this motion); and Criterion (vi) (Conditions 33-35, of which 33 and 34 are at issue). As a result, the Special Conditions at issue in this Motion relate only to Criteria (ii) and (vi).

The law is clear that imposing certain conditions in order to "minimize the concerns" of a citizens' group (CCOC) are not legitimate legal reasons for imposing Special Conditions pursuant to a grant of siting approval. Further, the Council's imposition of the challenged

conditions is not reasonable and necessary to accomplish the purposes of the Act, is unsupported by the record of the proceedings, and contravenes the terms of the Host Agreement. The conditions imposed are arbitrary in nature and designed in large part simply to shift, *ex post facto*, the City's previously agreed-upon financial obligations onto RWD. There is no genuine issue of material fact present with regards to the fact that the Special Conditions are wholly unsupported by the record and against the manifest weight of the evidence. Therefore, the conditions are improper as a matter of law, and, again, should be modified to comport with the undisputed evidence contained in the record made in this proceeding.

II. STANDARDS

The applicable standard for granting a Motion for Summary Judgment is well-established. The Illinois Supreme Court in *Chatham Foot Specialists, P.C. v. Healthcare Services Corporation*, 216 Ill.2d 366 at 376, 837 N.E.2d 48 at 49 (2000), stated:

> "A Motion for Summary Judgment is properly granted when the pleadings, depositions, admissions, and Affidavits on file establish that no genuine issue of material fact exists and, therefore, the moving party is entitled to judgment as a matter of law."

Under the standard enunciated by the Illinois Supreme Court and as is similarly set forth at Section 101.516 of the Pollution Control Board Rules, this case is clearly appropriate for summary judgment.

In an appeal seeking review of conditions imposed upon an applicant seeking siting approval, the Petitioner bears the burden of proving that the Application as submitted, without the conditions, would not violate the Act or the Board's regulations. *Browning-Ferris Industries of Ill., Inc. v. PCB*, 179 Ill.App.3d 598, 607, 534 N.E.2d 616 (2nd Dist. 1989); *Jersey Sanitation Corp. v. IEPA*, PCB-00-082 at 6 (June 21, 2001). A condition that is not necessary to accomplish the purposes of the Act or Board regulations is arbitrary and unnecessary and must be deleted. *Jersey Sanitation,* at 4-5. When considering whether a condition is necessary to

accomplish the purpose of a Section 39.2(a) siting criterion, the Board must determine whether the local government's decision to impose the condition is against the manifest weight of the evidence. *Waste Mgmt. of Ill. v. Will Co. Bd.*, PCB 99-141 at 3 (Sept. 9, 1999) (*affirmed, Will Co. Bd. v. Ill. PCB*, 319 Ill.App.3d 545 (3rd Dist. 2001). Where special conditions imposed on a siting application are against the manifest weight of the evidence, the Board is required to reverse the conditions. *Id.* A decision is against the manifest weight of the evidence if the opposite result is clearly evident, plain, or undisputable from a review of the evidence. *Tate v. Illinois Pollution Control Bd.*, 188 Ill.App.3d 994, 544 N.E.2d 1176(4th Dist. 1989) citing *Harris v. Day* 115 Ill.App.3d 762, 451 N.E.2d 262. (4th Dist. 1983).

III. RELEVANT STATUTORY AND REGULATORY PROVISIONS AND APPLICABLE LAW

The City's local siting ordinance sets forth procedures and requirements consistent with the Illinois Environmental Protection Act, 415 ILCS 39.2 ("the Act"), and specifies that an Application must meet the nine siting criteria set forth in the Act. Those criteria are:

(i) the proposed facility is necessary to accommodate the waste needs of the area it is intended to serve;

(ii) the facility is so designed, located and proposed to be operated that public health safety and welfare will be protected;

(iii) the facility is located so as to minimize incompatibility with the character of the surrounding area and to minimize the effect on the value of the surrounding property;

(iv) (A) for a facility other than a sanitary landfill or waste disposal site, the facility is located outside the boundary of the 100 year flood plain or the site is flood-proofed; (B) for a facility that is a sanitary landfill or waste disposal site, the facility is located outside the boundary of the 100 year flood plain, or if the facility is a facility described in subsection (b)(3) of Section 22.19a, the site is flood-proofed;

(v) the plan of operations for the facility is designed to minimize the danger to the surrounding area from fires, spills, or other operational accidents;

(vi) the traffic patterns to or from the facility are so designed as to minimize the impact on existing traffic flows;

(vii) if the facility will be treating, storing or disposing of hazardous waste, an emergency response plan exists for the facility which includes notification, containment and evacuation procedures to be used in case of an accidental release;

(viii) if the facility is to be located in a county where the county board has adopted a solid waste management plan consistent with the planning requirements of the Local Solid Waste Disposal Act or the Solid Waste Planning and Recycling Act, the facility is consistent with that plan; and

(ix) if the facility will be located within a regulated recharge area, any applicable requirements specified by the Board for such areas have been met.

In addition, the City's Siting Ordinance requires that the landfill siting decision must be:

> by resolution in writing, specifying the reasons for the decision, such reasons to be in conformity with section 39.2(a) of the act. In granting site location approval, the city council may impose such conditions as may be reasonable and necessary to accomplish the purposes of the act to the extent that said conditions are not inconsistent with act and the regulations promulgated by the state pollution control board.

(Rochelle Municipal Code, Article III, Division 1, Sec. 78-77(b)).(emphasis added)

The City Council's decision on a siting permit must be based on the evidence admitted at the public hearing, the entire siting record and, *to the extent supported by the record*, the recommendation of the Hearing Officer. (*Id.*).

In granting approval for a site, the governing body of a municipality may impose only those conditions that are reasonable and necessary to accomplish the purposes of Section 39.2, and are not inconsistent with the regulations promulgated by the Board. *Waste Mgmt. of Ill. v. Will Co. Bd.*, PCB 99-141 at *2 (Sept. 9, 1999). To be permissible, conditions must be "reasonable and necessary to meet the waste needs of the area." *Will Co. Bd. v. PCB*, 319 Ill.App.3d 545, 548 (3rd Dist. 2001).

IV. ARGUMENT

In this case, the Applicant satisfied the burden of proving that criterion ii and iv were met without imposition of any special conditions. (Hearing Officers Findings of Fact, at 5, 20, 34). No testimony was offered that Applicant did not satisfy criterion ii and vi without imposition of special conditions.

When considering the grant of siting approval, the City Council is required to accept uncontradicted and unrebutted expert testimony. In *Industrial Fuels & Resources/Illinois, Inc. v. Illinois Pollution Control Board,* the Illinois Appellate Court overturned the Board's upholding the denial of siting approval involving criterion ii on the basis that the expert witnesses presented by the applicant were never contradicted or rebutted. 227 Ill.App.3d 533, 546-47, 592 N.E.2d 158, 157 (1st Dist. 1992). The Court explicitly stated "We conclude that Harvey failed to rebut or contradict Industrial's showing that the facility was designed in light of the public health, safety and welfare. Therefore, the Board's affirmance of Harvey's finding on that criterion is against the manifest weight of the evidence." Id. at 547, 157. Also, in *CDT Landfill v. City of Joliet*, the Board found that a City challenging siting approval "identified a number of flaws with the evidence provided by CDT (applicant), but offered no expert opinion that any particular design feature or operating procedure might increase the risk of harm to the public." *CDT Landfill v. City of Joliet* , PCB 98-60, 1998 WL 112497, 12-13. The Board therefore held that CDT met the standards of compliance with criteria ii.

In this case, Applicant's expert testimony and evidence regarding the expansion plan was uncontradicted and unrefuted. Therefore, there is no support for the imposition of the special conditions, and their imposition is against the manifest weight of evidence as a matter of law.

The evidence presented in this case confirms that the proposed expansion is designed to be operated so as to protect public health, safety and welfare, and the Applicant demonstrated

compliance with all of the siting criteria of Section 39.2(a) *without* the Special Conditions. The challenged conditions are not necessary to assure compliance with the Act and are inconsistent with the regulations promulgated by the Board.

Of the five (5) Special Conditions at issue in this Motion, the Council's Resolution associates Conditions 13, 22, and 23 with Criterion (ii). (Resolution R07-10). Conditions 33 and 34 were associated with Criterion (vi). In each case, however, the Special Conditions imposed by the City Council are not reasonable, are not based upon evidence in the record and are not necessary to achieve compliance with the Act. The Special Conditions are not supported by the testimony of the experts, or by any portion of the record.

There is no genuine issue of material fact present in the record that the conditions imposed are unnecessary, arbitrary and against the manifest weight of evidence. Therefore summary judgment must be granted in favor of Petitioner.

A. Conditions 13, 22, 23, purportedly imposed pursuant to Criterion (ii)

The Applicant, by its own admission, submitted an exhaustive, comprehensive Application whose data establishes that the proposed expansion complies fully with Criterion (ii). In addition, expert witness testimony concerning Criterion (ii) was provided at the public hearings by Daniel Drommerhausen, Devin Moose, Christopher Lannert and Charles Norris. Drommerhausen, Lannert and Moose testified that the Application for the proposed expansion complies with the requirements of Criterion (ii). Norris had no opinion as to whether the Application complies with Criterion (ii).

a. Application data

i. The Locale/Geology/Water Safety

Application data shows that the site complies with all requirements relevant to Criterion (ii) and that Special Conditions 13, 22 and 23 are not necessary or supported by the evidence.

The facility's operations will be screened from view along South Mulford Road, East Creston Road, South Locust Road, and Illinois Route 38 by a vegetated earthen berm or fence with a total height of no less than 8 feet. (Application, Table 2.1-1(L/M). The proposed expansion will be located more than 500 feet from all occupied dwellings, schools, retirement homes, hospitals, or like institutions unless written permission for a closer distance from the owner is provided prior to permit approval. (Table 2.1-1(N)).

The hydrogeologic analysis conducted by Shaw Environmental confirmed that the proposed expansion is located and designed so as to protect the public health, safety, and welfare. (Application, Section 2.2-1). The geology of the site will supplement the proposed expansion design and will provide a high level of environmental safety. (*Id.*).

ii. Litter Control

The Application establishes that the site will feature a number of operating procedures to minimize and control litter. (Application, Section 2.6-6). Incoming refuse vehicles will be required to be fully-enclosed or to have covers or tarps to prevent waste from blowing out of the vehicles. (*Id.*). The active disposal area will be kept as small as possible and will be covered at the end of each day with daily cover materials including soil, synthetic covers, and alternate daily cover materials as approved by the FDA. (Application, Section 2.6-6) (but see Condition 13, which, paradoxically enough, would dramatically increase the size of the working face). The entire facility will be surrounded with a perimeter fence and exterior berm to collect litter that may escape beyond the active face. (*Id.*) Daily activity will be modified during periods of high winds. (*Id.*) Temporary litter fences will be used near the active face to provide additional protection against blowing litter. (*Id.*). Operations will be suspended whenever sustained winds reach 35 mph, in times of tornado alert, or if the City determines the Operator has not or is not able to adequately prevent or control blowing litter from leaving the facility. (*Id.*) Laborers will

patrol the facility and the surrounding property to collect any litter that escapes the active fill area, including litter caught by the portable and perimeter fencing, with collected litter being placed either directly into the landfill and covered, or placed in a secure, covered container for later disposal. (*Id.*).

Laborers will conduct daily inspection of Mulford Road from the landfill facility entrance gate extending north to Illinois Route 38. (Application, Section 2.6-7). They will also inspect Illinois Route 38 from the intersection of Mulford Road extending west to the Interstate 39 interchange. (*Id.*).

B. Expert Testimony

a. Mr. Daniel Drummerhausen

Mr. Drommerhausen is a professional geologist at Shaw Environmental who holds a master's degree in hydrogeology. (Tr. 1/23/07 at 199). He testified concerning the process of conducting a geologic/hydrogeologic site analysis. His testimony included a detailed explanation of the geology of the landfill site and the role of geology in the landfill's design, including the importance of predicting potential migration pathways and the accompanying need for designing appropriate monitoring systems to ensure safety. (Tr. 1/23/07 at 200-205; 214-15). He described the extensive testing that was done to determine conductivity at the site. (Tr. 1/23/07 at 216-226).

b. Mr. Devin Moose

Mr. Moose is a civil engineer with more than twenty years of experience in landfill design, who is the director of the St. Charles, Illinois office of Shaw Environmental. He explained that the Application in this case complies with the relevant regulations pertaining to seismic impact zones, flood plains, wetlands, endangered species and setback requirements. (Tr. 1/24/07 at 146-150; PowerPoint 21 to 25; *see also* Application 2.1-1 to 14). For example,

although the required setback from community water supply wells is 2,500 feet, in this case the proposed facility is more than 6,000 feet from the nearest such well. (Tr. 1/24/07 at 149-150). Mr. Moose testified that the proposed expansion will include exhumation of the old unlined landfill, Unit 1, which will occur as quickly as possible, with the waste from Unit 1 being placed into Cell One of the expansion area. (Tr. 1/24/07 at 177-79). This process will involve removing the accumulated waste from an area that is currently unlined, and placing it into a modern, lined area, thereby providing substantial environmental benefits. (*Id.*) He explained that a construction quality assurance ("CQA") officer will be on-site to oversee the exhumation, and that the exhumation activities will be reviewed and permitted by IEPA. (Tr. 1/24/07 at 178-179).

c. Mr. Charles Norris

Mr. Charles Norris, a consultant and professional geologist retained by an objector, the Concerned Citizens of Ogle County ("CCOC"), is not an engineer, and had no opinion concerning the engineered components of the proposed expansion. (Tr. 1/25/07 at 255-56; 259). Most importantly, Mr. Norris testified that he would not render an opinion as to whether the proposed expansion satisfies Criterion (ii). (Tr. 1/26/07 at 156). He did, however, opine that if the City Council granted siting approval, the Application would likely be routinely approved by the IEPA. (Tr. 1/25/07 at 262). He further opined that Unit 1 could probably be managed even without any exhumation, and he encouraged the City Council to consider alternatives to exhumation of Unit 1. (Tr. 1/25/07 at 324-25). Mr. Norris went on to explain that he would make no recommendation to the City Council concerning Unit 1. (Tr. 1/26/07 at 195).

d. Mr. Christopher Lannert

Mr. Christopher Lannert is president of the Lannert Group, is a registered landscape architect in Illinois, and offered his expertise with regards to the areas of planning, community

consulting and landscape architecture. (Tr. 1/22/07 at 80,81). Mr. Lannert testified that the proposed facility is compatible with the general character and agriculture of the surrounding area and found no incompatibility at all with the proposed landscape plan. (Tr. 1/22/07 at 96, 97). Mr. Lannert testified that the proposed berm on Creston Road would be compatible to the character of the landscape at 8 to 10 feet tall. (Tr. 1/22/07 at 92, 100, 153). Nowhere in his testimony or evidence submitted resulting from his observation or testing of the character of the surrounding area did Mr. Lannert find that a berm height of 14 feet was necessary, or that a secondary operational berm was necessary.

When viewed together, the Application and the testimony of the experts at the hearing showed conclusively that the Applicant has met the requirements of Criterion (ii) without the need for imposition of the Special Conditions at issue in this Motion.

1. **Condition 13. There is no genuine issue of material fact present that imposing a 6 year deadline to exhume waste from Unit 1 is not supported by the record, is against the manifest weight of the evidence, and therefore must be stricken as a matter of law.**

Condition 13 requires that:

> The Operator shall complete the exhumation and redisposal of waste from Unit I as soon as practicable, but in no event later than six (6) years from the date an IEPA permit is issued for the expansion, except as otherwise provided by the City Council for good cause shown. The waste exhumation and redisposal shall be restricted to the months of November, December, January, February and March unless it is demonstrated to the City Council that the process can occur in other months without off-site odor migration or other impacts associated with the process.

(Resolution R07-10, at Attachment A, ¶ 13).

The Application makes clear that the waste proposed to be exhumed from Unit 1 was continuously deposited at the site year-round, over a twenty-three year period, from 1972-1995. This represents a substantial amount of waste in terms of weight and volume. Condition 13 not only requires that all of the waste be exhumed within six years, it also limits exhumation work to

the months of November through March, thus effectively requiring the Operator to remove 276 months (23 years x 12 months) of accumulated waste within, at most, and under optimal conditions, 30 months (6 years x 5 months). Notably, the months during which exhumation is permissible under this Condition are those most likely to include substantial periods of inclement weather. There is no evidence in the record to support the proposition that the exhumation must be completed within six years in order to protect the public health, safety and welfare. In fact, special condition 13 imposes such unnecessary time constraints upon the exhumation that it may in fact jeopardize the safety of the exhumation process.

The Application includes Shaw Environmental's discussion of the proposed exhumation, and provides detailed plans and procedures, including the equipment to be used, the method of excavation of cover, the proposed hours and times of year for the exhumation, the nature and quantity of cover to be used, the procedures to be used in addressing any hazardous waste that may be encountered, an air monitoring program, stormwater management requirements, and other safety procedures. Shaw Environmental generally estimates that relocation of Unit 1 could be accomplished over a 5-10 year period. (Application, Section 2.6, page 2.6-24).

The only other empirical evidence concerning the exhumation of Unit 1 was provided by Devin Moose, of Shaw Environmental, who explained that the full exhumation process would take "on the order of about 10 years" to complete. (Tr. 1/25/07, pp. 321-23) (emphasis added). Moreover, the Host Agreement negotiated between the City and RWD provides at Section 7.4 that the exhumation is to be "commenced and completed within a commercially reasonable time," with the City to bear the first $850,000.00 of the cost and the Operator to bear the balance of the cost. This cost apportionment was based on the parties' clear and unequivocal agreement that exhumation would be performed in a *commercially reasonable* timeframe. Moreover, the

Host Agreement clearly provides that the timing, sequence, and manner of exhumation will be determined by the IEPA, and by the mutual agreement of the City and the Operator.

There is no scientific or professional analysis establishing the necessity, or even the feasibility, of performing such an accelerated exhumation. The record and the expert testimony do not establish that the acceleration is necessary to protect the public health, safety and welfare. The timeframe proposed in Condition 13 was not established as a result of a risk assessment, feasibility study, or health and safety analysis, and did not arise pursuant to any investigation into the nature, quality, and quantity of waste in Unit 1. Notably, the expert for Concerned Citizens of Ogle County ("CCOC"), Mr. Norris, testified that he did not even believe exhumation of Unit 1 was necessarily required *at all* to protect public safety. (Tr. 1/25/07 at 324-26). In fact, he specifically urged the Council to consider *not* exhuming Unit 1. (*Id.*).

During the meeting that led up to passage of Resolution R07-10 and the imposition of the Special Conditions, the Attorney for the City Council explained that it could be assumed that between two and two and a half million yards would need to be exhumed. (Tr. 4/11/07 at 87). He opined that, "It would be difficult to certainly complete it within six years" and noted that "testimony at the hearing indicated that the applicant, the operator believed that a 10 year period was the appropriate period over which this waste could be exhumed and later then redisposed." (Tr. 4/11/07 at 85) (emphasis added).

When the City Council met on May 8, 2007 to discuss the Motion for Reconsideration, Council Member Berg appeared to have second thoughts, and expressed concern that forcing a rushed exhumation could lead to problems, noting that "when you start putting arbitrary time periods on things – there's not one person out here that has a clue how long this is going to take. . .We're sitting here trying to make a decision that frankly we don't have the knowledge to make as far as how long it's going to take." (Tr. 5/8/07 at 23) (emphasis added).

Berg further noted that "when you start hurrying people on things that's when things happen when you put those arbitrary time lines, deadlines on people." (Tr. 5/8/07 at 24-25) (emphasis added). Council Member Hayes echoed that concern, observing that:

> I don't have the expertise to make this decision, but the fact of the matter is we don't need it to be done any faster to make it more risky to the health, safety and welfare of the people. . . .I'm sure that the Applicant and the operator would like to have it out of there and into a land facility as soon and as practically financially as possible. . . .[W]hat's in the best interest of the community is to get it out of there – like you said, get it out of there as soon as we can but don't race to get it out of there to where we can't get the – where the blowing factor is connected, the smell is an issue, and the safety is issue and the inspections are impractical. . . So in my opinion we have to – we can't restrict it, shorten up the time any more or anything. We have to allow some flexibility, because no one knows what we're getting into when we get there.

(Tr. 5/8/07 at 27-28) (emphasis added).

It was pointed out during the Council's deliberations that the Host Agreement calls for exhumation to be completed within a commercially reasonable time, as did the Application. The Council Members, however, were clearly uncomfortable with the concept of something being "commercially reasonable," calling that concept "too big of a gray area" and an "undefined standard." (Tr. 5/8/07 at 29, 30).

Of even greater significance is the fact that this Condition seeks to wrest from the IEPA its regulatory authority to determine the permit conditions under which exhumation and relocation of the waste will occur. Thus, the Condition is not only inconsistent with the Board's regulations, it is in direct contravention of the regulations. It is the IEPA, not the City Council, that should decide the methodology and timeframe for the exhumation.

Finally, the Applicant agrees that Condition 13 "very likely does not meet the applicable legal standards, and would invite a successful appeal because it is not supported by the record." (Applicant Response to Operator Motion for Reconsideration at 4 and 7).

In summary, requiring completion of the full exhumation process within the compressed timeframe dictated by Condition 13 would drastically increase the cost of operations, and severely undermine the Operator's ability to go forward with the proposed expansion. Moreover, it contravenes the clear and unequivocal agreement of the parties on this specific issue as reflected in the Host Agreement, which, again, was submitted as part of the Application in this case. It is also in direct conflict with the Board's regulations, inasmuch as it seeks to vest the City Council with authority to determine the permit conditions for the exhumation. Finally, this condition is unsupported by evidence in the record, and is not required to meet Criterion (ii). Clearly, Special Condition 13 should, and must, be amended to conform to the record and accordingly, as a matter of law, should require the exhumation to take place within 10 years from the date an IEPA permit is issued for expansion.

2. **Conditions 22 and 23. There is no genuine issue of material fact present that imposing expanded berming requirements is not necessary to accomplish the purposes of the Act, is against the manifest weight of the evidence, and therefore must be stricken as a matter of law.**

Condition 22 requires that:

> The plan of operations shall include the construction of operational screening berms of between six (6) and eight (8) feet in height along the Southern edge and partially along the East and West edges of operating cells to help to block the operations from view from Creston Road as well as help contain litter and reduce noise impacts. The Operator shall propose, and the City Manager shall consider for approval, the placement and limits of the operational berms prior to each cell's development. Final approval must be obtained prior to new cell construction. The City Manager shall consider the height of the active face, the distance from the site boundary, and the presence of other visual barriers (such as Unit 2) and the effectiveness of other litter and noise control strategies (such as litter fences and permanent perimeter berms) in making its determination.

(Resolution R07-10, Attachment A, ¶ 22).

Condition 23 requires:

> Perimeter berms shall be built in advance of the cells in order to screen operations to a reasonable extent. It is recommended to require the berms to be built at least 500 feet in advance of the Easternmost edge of the cell being constructed. By way

> of example, prior to completion of Cell 3's liner, the Southern berm along Creston Road shall be constructed from E 4,200 to E 6,500, which extends approximately 600 feet East of the cell. The vegetation shall be established (with at least a one-year growing period) prior to waste being placed within 400 feet of a cell with active waste placement. The berm shall be at least 14 feet in height, placed between the waste footprint and Creston Road, and located between E 4,500 and E 7,500.

(Resolution R07-10, Attachment A, ¶ 23).

As a threshold matter, Condition 22 vests excessive, arbitrary discretion in the City Manager to decide berming requirements on an *ad hoc* basis, creating the potential for disruption of operations at the site. In addition, Conditions 22 and 23 call for extended berm heights and placements for both the perimeter berm, which must be fourteen (14) feet high according to Condition 23, and for the operational screening berms, which must be six (6) to eight (8) feet high according to Condition 22. Inasmuch as Condition 23 requires a fourteen (14) foot tall perimeter berm, it is unnecessarily duplicative and redundant to also require the construction of six (6) to eight (8) foot tall operational screening berms inside the facility. Further, City Council Attorney Moran conceded that the berm required in Condition 22 "is not intended and generally does not function as a fence or as a barrier for litter." (Tr. 5/8/07, p. 33). It is further conceded that no testimony from Mr. Lannert supports raising the berm that is the subject of Condition 23 from 8-10 feet to 14 feet. (Tr. 5/8/07, pp. 37, 39, 41, 42).

The Administrative Code provides that a facility located within 500 feet of a township or county road or state or interstate highway shall have its operations screened from view by a barrier no less than 8 feet in height. (Title 35, Section 811.302(c)) (emphasis added). In keeping with this, the Applicant specifically proposed to screen the facility's operations from view along South Mulford Road, East Creston Road, South Locus Road, and Illinois Route 38 by a vegetated earthen berm or fence with a total height of not less than 8 feet. (Application, Table 2.1-1(L/M). Yet here, without any basis in the record, the Council seeks to require that the

perimeter berm be fourteen (14) feet high, or seventy-five percent taller than the law requires. This mandate is excessive, particularly given the fact that the landfill is located in an agricultural area consisting primarily of fields of corn and soybeans. Moreover, testimony by witnesses Shaw Environmental and Chris Lannert at the hearing established that the proposed berms were carefully considered by the City in formulating the Application.

As explained above, the Application delineates numerous, detailed operating procedures that will minimize and control litter. (Application, Section 2.6-6). In addition to requiring that incoming vehicles must be fully-enclosed or be covered with tarps, the active waste disposal area will be kept small and will be covered at the end of each day. (*Id*). The entire facility will be surrounded with a perimeter fence and exterior berm which will catch litter that might otherwise escape beyond the active face. (*Id.*) Daily activity will be modified during periods of high winds, and temporary litter fences will be used near the active face, with operations suspended during periods of high, sustained winds, tornado alert, or if the City finds that the Operator is not adequately controlling litter. (*Id.*) Laborers will patrol the facility and surrounding area to collect any escaping litter, and will conduct daily inspection of Mulford Road from the landfill facility entrance gate extending north to Illinois Route 38. (Application, Section 2.6-7). They will also inspect Illinois Route 38 from the intersection of Mulford Road extending west to the Interstate 39 interchange. (*Id.*).

The engineering challenges and additional costs associated with these additional berm requirements would have a serious, deleterious effect on the economic feasibility of the project, while offering no additional benefit to the public health, safety and welfare or litter control. Increasing the berm height would necessarily create a much larger base for the berm, not only for engineering reasons but also because the berm must be landscaped and maintained, and worker safety concerns would limit the degree of permissible slope. Thus, a higher berm consumes a

substantial amount of footprint area, making that area unavailable for waste disposal. As a result, the additional berming requirement contributes to making the project financially and technically impracticable and infeasible, and is inconsistent with the terms of the Host Agreement.

The discussion of the City Council members when they met on May 14, 2007 to reconsider the conditions are illuminating, and shed light on the motive behind these conditions. At that meeting, Condition 22 only narrowly survived, by a vote of 4 to 3. Council Member Hollonbeck observed that the active faces are so high she didn't believe an operational screening berm, no matter what its height, would do anything to obstruct the view of operations. (Tr. 5/8/07 at 36). She further noted that she had taken another look at the pictures provided by expert witness Lannert, and that with respect to those pictures:

> if you look back at those it didn't seem to me that an operational berm would do much, so I confess I hadn't done that when we were looking at special conditions. Just the topography is such that either the rollingness of the site or whatever you can see this onsite tower really easily but you can't really see the operational – the – active face. So that was my opinion on – after rereading and looking at their Item 6, Special Condition 22 I would be inclined to delete it.

(Tr. 5/8/07 at 36-37) (emphasis added).

The transcript of the May 8, 2007 Council meeting also reveals that Council Members erroneously believed that granting the Motion's request concerning Special Condition 22 and 23 would leave the landfill with no berms whatsoever. Council Member Hayden stated "they say it's tactically and financially impractical to construct a 14-foot berm. If we eliminate both of these we either have a zero foot – no berm or 14-foot high, there's nothing suggested in between?" (Tr. 5/8/07 at 35). The Council's attorney, Mr. Moran, replied, "Nothing has been suggested in between by what's indicated here, that's correct." (*Id.*).

However, as to Special Condition 23, Ms. Hollonbeck then responded that:

> Mr. Lannert does propose a berm all the way around the perimeter and it would move along with the construction of the new cells, but it was only 8 to 10 feet tall, not 14. . . So the – the motion to consider – to reconsider didn't say go back to 8 to 10 feet, it just said 14 feet is technically and financially impractical. So I don't know what we do about that.

(Tr. 5/8/07 at 37).

Mr. Berg opined that the operational berm was "more of a punitive measure to the operator than it is an operational advantage to anybody. It's saying you have done a bad job, we're going to make you put another berm in." (Tr. 5/8/07 at 38) (emphasis added). Member Hollonbeck agreed. (*Id.*). After some discussion, Attorney Moran then suggested, "Even though the motion hasn't specifically requested relief other than the suggestion that the 14-foot berm be simply deleted, that requirement, you could certainly consider based upon the contents of the record of modifying the condition to reflect what you believe to be the appropriate evidence presented and what the evidence would support, and it may be that 8 to 10-foot berm as set out in the report that Mr. Lannert did." (Tr. 5/8/07 at 39). Ms. Hollonbeck pointed out the testimony of Lannert concerning the proposed 8 to 10 foot berm, and suggested that the Council approve that berm height. (*Id.* at 40). She opined again that the proposed 14 foot berm had been intended merely as a punitive measure. (*Id.* at 41).

Council Member Eckardt then declared, "I think the conditions were put in there because of previous performance and *I think that's part of what this is all about, and I think for us to drop **any** of those would be a big mistake.*" (*Id.* at 42) (emphasis added). When others tried to determine whether there was any evidence in the record to support the heightened berm requirements, it was observed that it was the Council's consultant who talked about the so-called operational berms, and Attorney Moran then observed "I don't recall if that was specifically identified by one of the witnesses in their testimony or referred to." (*Id.* at 42). He went on to

confirm that it was the Council's hired consultant who came up with the idea for a 14 foot perimeter berm. (*Id.*).

When Council Member Hayden asked Attorney Moran whether there was any evidence in the record to support the 14-foot requirement, Moran responded that he would have to: "...go back and look through the record. Frankly, I don't recall specifically that number being used either in the application or the testimony, although I can't say definitively that it's not someplace in the record." (*Id.* at 47). He then opined, "Obviously the consultant determined that was an appropriate height...[and] they obviously felt on some basis that the 14 feet was appropriate, but I can't point to you a specific part of record where we see that 14 feet." (*Id.* at 47-48). (Emphasis added).

Ultimately, when it came time to vote on the perimeter berm, Council Member Hayden declared that he was voting to affirm the Special Condition's requirement of a 14 foot berm, explaining, "I make that vote because of the inconsistencies in the record and *I have to go with the experts that I hired.*" (*Id.* at 52.) (emphasis added). The rest of the Council Members followed suit in voting to affirm the Special Condition.

Rather than relying on the evidence in the record, the Council members appear to be motivated by a desire to be punitive and "hold [RWD's] feet to the fire", and by an unjustified reliance on the opinion of the Council's "paid" consultant. As Council Member Hayden stated at one point, "I listened to the consultant, I think he's smarter than I am..." (Tr. 4/11/07 at 91). Moreover, at least one Council Member appeared to believe the consultant may have been influenced by a desire to be punitive as well, as illustrated in the following colloquy:

> MR. HAYDEN: Where did the experts get that information from when they came up with the conditions, they knew it had to meet the record?
>
> MS. HOLLONBECK: I guess I'm going to go along with Dennis' analysis, maybe it was just a punitive measure to put those

> operational berms in, because it wasn't part of Mr. Lannert's presentation.

(Tr. 5/8/07 at 41) (emphasis added).

The transcripts make clear that there was a determined attempt to use RWD's past operational shortcomings as a whipping boy to justify the imposition of conditions entirely unrelated to those shortcomings or violations, and this is a prime example of that effort.

Conditions 22 and 23 enjoy absolutely no support in the record, and offer no additional benefit to the public health, safety, and welfare. The imposition of Conditions 22 must therefore be stricken as a matter of law as being against the manifest weight of the evidence, and Condition 23 should be amended to conform to the record to require berms between 8 to 10 feet in height, consistent with the evidence presented in this proceeding and the application filed in this matter as follows:

> Perimeter berms shall be built in advance of the cells in order to screen operations to a reasonable extent. It is recommended the berms be built at least 500 feet in advance of the Eastern-most edge of the cell being constructed. By way of example, prior to completion of Cell 3's liner, the Southern berm along Creston Road shall be constructed from E 4,200 to E 6,500, which extends approximately 600 feet East of the cell. Vegetation shall be established (with at least a one-year growing period) prior to waste being placed within 400 feet of a cell with active waste placement. The berm shall be an undulating berm 8 to 10 feet in height, placed between the waste footprint and Creston Road and located between E 4,500 and E 7,500, with plant material being placed on top of the berm in accordance with the landscape plan contained in the Application, including, without limitation, plant material in excess of six (6) feet in height as provided for therein.

3. **Conditions 33 and 34. There is no genuine issue of material fact that imposing the cost of additional Mulford Road improvements solely on Petitioner is not necessary to accomplish the purposes of the Act as to Criterion (vi), is not supported by the record, and must be amended to conform to the record as a matter of law.**

> Condition 33 provides that:
>
> The following roadway improvement shall be made to Mulford Road, at the expense of the Operator, prior to acceptance of waste within the expanded facility waste footprint:

> The reconstruction of Mulford Road between Route 38 and the existing landfill entrance shall be designed to a rural standard with a dust free, all weather surface, provide a design weight limit of 80,000 pounds and shall be at least two lanes wide.

(Resolution 07-10, Attachment A, ¶ 33).

Condition 34, as amended by Resolution R07-18, requires:

> The improvement to Mulford Road as described in special condition 33 above shall be completed from the existing landfill entrance to Creston Road, no later than the date on which the proposed new entrance for the expansion is built and completed as required in Special Condition 16. The Operator shall pay all costs of said improvements to the new landfill entrance, and a portion of the cost of the improvements from the new landfill entrance to Creston road proportionate to the anticipated traffic attributable to the expanded facility, as determined by a traffic study.

(Resolution R07-18).

Traffic expert Werthmann testified that most of the traffic that can be expected to use the landfill is already using it, since the expansion is simply a continuation of existing operations. (Tr. 1/23/07 at 23-24, 29, 30-31). Werthmann's estimates were extremely cautious, and although the landfill expansion is expected to eventually process as much 1,000 tons of waste per day, Werthmann used a substantially higher figure – 1500 tons per day – in his calculations. (See Tr. 1/23/07 at 29). Werthmann's studies showed that the increased volume of traffic on Mulford Road would be "not significant by any means." (Tr. 1/23/07 at 34-35) (emphasis added). The Hearing Officer also noted that the evidence presented at the hearing showed that "the majority of the traffic generated by the proposed expansion is already on the roadway system. There will be little new traffic generated by the expansion." (Hearing Officer's Findings of Fact, Conclusions of Law, and Recommendations at 31) (emphasis added).

Werthmann testified concerning the existing plans to improve Mulford Road to accommodate transfer trailers, to reconstruct the road as a two-lane road with an 80,000 pound weight limit. (Tr. 1/23/07 at p. 21). The Hearing Officer's Findings of Fact and Conclusions of

Law reflect that the sole evidence concerning Criterion (vi) was presented by Werthmann. (Hearing Officer's Findings of Fact and Conclusions of Law, at 28-34).

An examination of the evidence reveals that the proposals of Special Condition 33 are largely duplicative of upgrades to Mulford Road which are already proposed for this section of road, which will be the primary route to and from the landfill. (*See* Tr. 1/23/07 at 21). Werthmann testified that 80% of the landfill traffic would use this route. (Tr. 1/23/07 at 27; PowerPoint Slide 14). Nevertheless, despite testimony that the increase in traffic would be "not significant by any means," Condition 33 requires that the Operator bear the *full* cost of the road improvements to the Mulford Road upgrades, and also adds a requirement that the road improvements must be completed ***prior to acceptance of any waste within the expanded facility waste footprint***.

Condition 34 then requires that, in addition to the upgrades mandated by Condition 33, the Operator must also provide the same upgrades to Mulford Road heading *south* from the landfill entrance to Creston Road. Among the unusual aspects of this requirement is the fact that the City Council here seeks to impose a requirement that RWD pay the entire cost of improving *a township road.*

In addition, the area encompassed in Special Condition 34 is one that is already targeted for growth as a commercial/industrial area, and, as Council Member Hollonbeck pointed out, the new landfill site entrance "won't be built for several years. . .and by that time there could be additional industry using Creston Road and Mulford Road." (Tr. 5/8/07 at 70). Council Member Hayden additionally observed: "The person that benefits from the construction of the road, probably across the street is zoned I2, they're the people that probably will benefit from it." (*Id.* at 72) (emphasis added). Warehouses and industrial sites generate far more traffic per acre than a landfill, and it is clearly inequitable to force the Operator to make road improvements before it

even opens the new entrance, and to bear the cost of road improvements for the benefit of other entities.

Significantly, City Council Attorney Moran also conceded that there was no testimony or evidence presented by any experts regarding cost allocation as related to potential traffic increase or burdens resulting from the expansion. (Tr. 5/8/07 at 69).

Nevertheless, the members of the Council were, once again, inclined to defer to their "paid" consultants and ignore the evidence. As Mr. Berg declared, "I think our City staff gave us a very good suggestion here and I'm inclined to go with what our City staff told us, that's my opinion." (Tr. 5/8/07 at 76). Ms. Hollonbeck quickly agreed, and Mr. Berg then added, "That's what we pay these people for is to give us the sound advice, that's my opinion." (Tr. 5/8/07 at 76-77). In the view of the Council Members, it appears that the actual evidence contained in the record was irrelevant, or, at best, superfluous, and all they really needed to decide the siting application was the unsubstantiated opinion of their "hired" consultants. Accordingly, at most, only the following Special Condition terms would be supported by the record made in this proceeding:

> The Operator and the City shall share in the cost improvements of Mulford Road from Route 38 to Creston Road on the basis of linear foot frontage, with the Operator's frontage share being 7,813 feet (representing the footage on both sides of Mulford Road from Route 38 to the Union Pacific Railroad Tracks, and the footage on the wast side of Mulford Road from the railroad tracks to Creston Road) and the City's share 2,573 feet (representing the footage on the east side of Mulford Road from the railroad tracks to Creston Road). The Operator shall advance the entire cost of the improvements, and the City shall contribute its share upon completion of the improvements. Operator shall have a right of recapture for its share of the costs against the adjacent benefitting properties, and an appropriate Recapture Agreement shall be executed and recorded.

V. CONCLUSION

The Application submitted for the proposed expansion of the Rochelle Municipal Landfill was exhaustively thorough in every detail, and reveals that the expansion meets every one of the Section 39.2 siting criteria.

The challenged Special Conditions as now structured were clearly not necessary to accomplish the purposes of Section 39.2 of the Illinois Environmental Protection Act ("the Act"), and are not supported by any portion of the record. As previously noted, these conditions were imposed clearly to "minimize fears" of a citizen group rather than to meet the requirements of the Act. Criterion ii and vi were clearly fully met without the imposition of Special Conditions.

The unilateral reallocation of previously agreed-upon costs under the guise of special conditions is also against the manifest weight of evidence and unsupported by any evidence on the record. Never in the history of Section 39.2 has the PCB held that special conditions can be used to allocate or shift costs. Rather, the appropriate place for determining cost allocation is in a Host Agreement. Section 39.2 recognizes the significance of the role of a Host Agreement, and accordingly requires that where there is an existing Host Agreement, that Agreement must be included as part of the record of the proceeding.

In summary, the Special Conditions imposed by the Rochelle City Council in their present form are not supported by any expert testimony, and the Applicant's expert testimony was completely unrefuted as to the compliance of the Applicant with their evidentiary obligations under the Act. The Special Conditions as now presented are inconsistent – and, in at least one instance, in direct contravention with – the regulations promulgated by this Honorable Board. Moreover, there is no support in the underlying record for these conditions as they now stand; the overwhelming majority of which run contrary to the terms of the Host Agreement and,

in many cases, are merely being used to unilaterally shift City costs onto RWD after the parties have already negotiated a mutually acceptable agreement for the operation of the landfill site. Accordingly, at a minimum, summary judgment should be entered as to Special Conditions 13, 22, 23, 33 and 34 in the manner and form outlined herein.

Special Conditions 13, 22, 23, 33 and 34 are against the manifest weight of the evidence, are contrary to the record and expert testimony and were arbitrarily imposed. Again, as noted above, they can only stand in modified form in the manner and form suggested herein. As a matter of law, no genuine issue of material fact exists regarding the impropriety of these conditions in their present form. Resultantly, summary judgment in favor of Petitioner, as requested herein is appropriate.

Dated: November 30, 2007

Respectfully submitted,

ROCHELLE WASTE DISPOSAL

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